

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition Filed By Multifamily Broadband)	MB Docket No. 17-91
Council Seeking Preemption of Article 52)	
of the San Francisco Police Code)	

REPLY COMMENTS OF INCOMPAS

INCOMPAS hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Public Notice*¹ soliciting input on the Multifamily Broadband Council’s Petition for Preemption seeking a declaratory ruling that Article 52 of the San Francisco Police Code is preempted by federal law and policy.²

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications network services. INCOMPAS represents companies that provide residential broadband Internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. As advocates for competition, innovation, and economic development, INCOMPAS supports those comments which see Article 52 of the San Francisco Police Code for what it is: “a pro-

¹ *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed By the Multifamily Broadband Council*, Public Notice, FCC 17-149 (rel. Apr. 4, 2017) (“Public Notice”).

² Petition for Preemption, Multifamily Broadband Council, MB Docket No. 17-91 (filed Feb. 24, 2017) (“Petition”).

competitive, barrier-removing local ordinance” with a now-proven track record for helping providers gain access to multi-dwelling units (“MDUs”) where tenants have requested alternative services.³ Accordingly, INCOMPAS urges the Commission to deny the Petition.

I. ARTICLE 52 IS A PRO-COMPETITIVE MEASURE THAT ENABLES COMPETITORS TO PROVIDE MDU RESIDENTS WITH INNOVATIVE COMMUNICATIONS SERVICES.

As the Commission is fully aware, the cost to deploy competitive broadband networks is significant.⁴ In addition to the high costs to construct their networks, competitive providers routinely encounter significant barriers when deploying facilities-based networks. INCOMPAS members, like Sonic Telecom, have indicated that their efforts to expand their BIAS and video service footprints have been frustrated by “unreasonable delays and costs associated with access to poles, conduits, [and] local permitting processes” as well as an inability to secure access to MDUs.⁵ Indeed, as discussed in its affidavit in this proceeding, Sonic was refused access to approximately 30 buildings in order to deliver service despite “hundreds of orders from

³ Comments of CALTEL, MB Docket No. 17-81 (filed May 18, 2017), at 12 (“CALTEL Comments”). CALTEL reports that one of its members, Sonic Telecom (which is also a member of INCOMPAS), has been “significantly more successful in gaining access to MDUs in San Francisco” by following the transparent timeline and process outlined in ordinance.

⁴ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request For Comment, WC Docket No. 17-84 (rel. Apr. 21, 2017). In this ongoing rulemaking, the Commission seeks comment on the costs associated with high-speed broadband in areas such as pole attachments, copper retirement, and streamlining the Section 214(a) discontinuance process.

⁵ CALTEL Comments, Declaration of Dane Jasper, at 4.

tenants”.⁶ The only justification as to why Sonic was not being provided with voluntary access was that the property owner “had had a bad experience” with a mobile wireless provider and “did not want to provide access to any other providers.”⁷

Before the adoption of Article 52, property owners and incumbent providers used a number of contractual methods, including exclusive wiring arrangements, and revenue sharing to circumvent the Commission’s prohibition on exclusive access agreements⁸ and stymie competitive providers from providing service to potential customers in MDUs. In 2010, the Commission released a *Second Report & Order* that declined to prohibit communications service providers from entering into bulk billing and exclusive marketing arrangements with MDU owners based on the belief that these arrangements could provide consumer benefits without “having new and significant anti-competitive effects on the whole.”⁹ Unfortunately, incumbent providers, property owners and MBC have distorted these and other arrangements to discourage

⁶ *Id.*

⁷ *Id.* at 5.

⁸ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), *affirmed*, *National Cable & Telecommun. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

⁹ *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report & Order, 25 FCC Rcd 2460, 2463 (2010) (“Second Report & Order”). With respect to allowing bulk billing practices, the Commission noted that while the practice “may make entry by other MVPDs marginally less attractive, it does not significantly hinder, much less prevent, [other providers] from entry” ensuring that bulk billing arrangements are not intended to be *exclusive* arrangements.

or deny MDU access to competitive broadband providers, like Sonic, which offer alternative communications services.

For example, Engine, a San Francisco-based non-profit, illustrates the problematic behavior of property owners demanding revenue sharing arrangements with competitive providers.¹⁰ Competitive broadband and video providers that are unable or unwilling to participate in this kickback scheme are denied access to MDUs—hence, limiting competitive options of residents in the MDUs. Furthermore, such schemes provide perverse incentives for property owners who deny competitive providers entry precisely because competition reduces the cash payments property owners receive.¹¹ Residents are often left in the dark about such kickback schemes and are simply told that competitive services are not available in the building.

Additionally, the City and County of San Francisco highlighted the use of wiring exclusivity arrangements between providers and property owners as a justification for the ordinance.¹² These arrangements, in which ownership of inside wiring is deeded to the building

¹⁰ See Comments of Engine Advocacy, MB Docket No. 17-91 (filed May 18, 2017), at 2 (“[B]uilding owners or landlords have set up exclusive contracts preventing competitive providers from installing the necessary equipment in their building to gain access to their tenants. In other cases, landlords have set up schemes that only allow providers into a building if they pay a monthly kickback fee for access to subscribers.”).

¹¹ Indeed, to highlight how perverse these incentives are under a revenue sharing scheme, cheaper and better competitive service providers are the most serious threat to the amount of revenue a property owner receives.

¹² See Opening Comments of the City and County of San Francisco, MB Docket No. 17-91 (filed May 18, 2017), at 5; *see also* Comments of Fiber Broadband Association, MB Docket No. 17-91 (filed May 18, 2017), at 8 (“Fiber Broadband Association Comments”) (detailing how Article 52 was designed to overcome entry barriers such as exclusive wiring arrangements).

owner in exchange for an exclusive use license, allowed incumbents to prevent utilization of existing inside wiring even after a customer has ceased service, even though the incumbent provider is required by law to either make the wiring available to another provider or remove it.¹³ As a result, competitive providers were forced into the difficult position of having to choose between installing expensive duplicative wiring or not serving residents in the building at all.

These practices obfuscate the original intent of the Commission's rules and make it difficult for competitive providers to gain lawful access to consumers in MDUs. In cases where incumbent providers are able to maintain monopoly control over a building and limit consumer choice, tenants are "more likely to be subject to rate increases, poor customer service, and less reliable access."¹⁴ The net impact is that deployment of competitive broadband and video service is discouraged. Monopolies also negatively affects the economic case for competitive providers to build competitive networks in communities, and as a result, residents (those residing in MDUs and single family homes) are potentially denied cheaper and better alternatives for video and BIAS services.

Given the MDU access challenges faced by competitive providers and the call by residents to have more choice for their communications services, the City and County of San Francisco's access ordinance is a refined solution that preserves and is consistent with the Commission's rules on inside wiring, bulk billing, and exclusive marketing arrangements,

¹³ 47 CFR § 76.802(a).

¹⁴ Comments of Institute for Local Self-Reliance, Public Knowledge, and Next Century Cities, MB Docket No. 17-91 (filed May 18, 2017), at 2.

protects incumbents' services, honors the property rights of the owner, and accommodates competitors seeking to meet the needs of tenants who have requested alternate BIAS, video, and voice services. Indeed, rather than "discouraging small providers from deploying to and serving MDUs,"¹⁵ the ordinance is already having a positive impact. Service providers are deploying facilities-based services and rushing to meet the backlog of tenants who want access to cheaper, faster, and higher-capacity BIAS services.¹⁶ Sonic Telecom, an INCOMPAS member, has submitted an affidavit in this docket confirming the pro-competitive impact the ordinance affords San Francisco's residents who want more choice. In fact, Sonic, which offers an unlimited Gigabit Fiber service starting at \$40, has been "significantly more successful in gaining access to MDUs in San Francisco" realizing a 2016 commitment to "helping San Franciscans get access to Internet services at gigabit speeds."¹⁷ At that price point, Sonic is able to offer MDU residents a competitive alternative to incumbents whose bundles start at \$70-80.¹⁸ As such, the Commission should not give *any* credence to the worst-case scenarios being heralded by providers that have

¹⁵ Petition at 5.

¹⁶ *See SF supervisor would give tenants access to all Internet provides*, SFGATE (Oct. 17, 2016, 7:11 PM), <http://www.sfgate.com/bayarea/article/SF-supervisor-would-give-tenants-access-to-all-9979280.php> (reporting that Webpass, a San Francisco-based high speed Internet provider, had been denied access to approximately 400 large apartment buildings in San Francisco before the ordinance was adopted).

¹⁷ CALTEL Comments, Declaration of Dane Jasper at 6, 3. *See also* Dane Jasper, *Dear Mr. President*, Sonic Blog (June 20, 2016), <https://corp.sonic.net/ceo/>.

¹⁸ *See, e.g., Internet, TV & Home Phone services in San Francisco*, AT&T, <https://www.att.com/local/california/san-francisco/> (last visited June 7, 2017). AT&T currently offers a service bundle with 1000 Mbps connection in the San Francisco area for \$80 a month.

no incentive to support competition or consumer choice. Neither should the Commission countenance those providers that do not operate in the San Francisco area, when the testimonials from operators that are deploying services in accordance with the ordinance prove that the law “provides a transparent process that ensures that property owners understand their rights and obligations.”¹⁹

II. ARTICLE 52 IS BRINGING COMPETITION TO A COMMUNICATIONS MARKETPLACE THAT REMAINS HIGHLY CONCENTRATED.

By adopting Article 52, the City and County of San Francisco has taken a critical first step towards bringing its residents the significant benefits that come from increased competition.²⁰ With respect to residential BIAS, the Commission has found that market concentration is high and that the majority of residential BIAS customers still have very limited options for high-speed service. In fact, 51 percent of Americans have only one fixed high-speed broadband option, ten percent have no option, and only 38 percent have a choice of two or more providers.²¹ (Unfortunately, the FCC has not provided us with additional detail of how many residential customers have three or more choices—most likely because it is a tiny fraction of

¹⁹ Comments of CALTEL, Declaration of Dane Jasper, at 6.

²⁰ See Fiber Broadband Association Comments at 8 (relaying San Francisco Supervisor Mark Farrell’s estimate that 50,000 units in approximately 500 MDUs in San Francisco could benefit from competitive Internet access if pre-ordinance limitations are removed).

²¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, FCC 16-6, ¶ 86 & Table 6 (Jan. 29, 2016) (“2016 Broadband Progress Report”).

American consumers.) Nonetheless, there is evidence that when a third provider enters the market, prices drop and the telco and cable incumbents respond, including increasing speeds, upgrading their infrastructure, and lowering prices.²² Thus, moving from two to three options in the marketplace is very beneficial for consumers.²³ San Francisco Supervisor Mark Farrell, the sponsor of Article 52, understood this when he introduced the ordinance calling the limited choices faced by residents “plain and simply bad for San Francisco” and declaring “we all have a vested interest in local laws which increase competition and ultimately deliver the highest quality Internet service at the lowest cost.”²⁴

The City of San Francisco has recognized that its residents benefit from more competition, and its action to ensure that its residents can exercise their choice by picking a new entrant should be encouraged and not thwarted by the Commission. In fact, if the Commission

²² *Google Gets Beaten to the Punch by AT&T on Super-Fast Broadband*, BLOOMBERG TECHNOLOGY (Apr. 25, 2016), available at <https://www.bloomberg.com/news/articles/2016-04-25/google-gets-beaten-to-the-punch-by-at-t-on-super-fast-broadband> (“Markets that Google enters enjoy a \$20-a-month drop in prices on average.”); *Google’s fiber effect: Fuel for a broadband explosion*, CNET (Apr. 30, 2014), available at <https://www.cnet.com/news/googles-fiber-effect-fuel-for-a-broadband-explosion/>.

²³ A limited number of Americans—only 13%—have cut the broadband cord and rely solely on mobile broadband. Home Broadband 2015, Pew Research Center, available at <http://www.pewinternet.org/2015/12/21/home-broadband-2015/>. The Commission has stated that “American consumers simply do not treat the two services as functional substitutes.” 2016 *Broadband Progress Report*, ¶ 40. Accordingly, mobile broadband is not a true substitute for most residential subscribers at this time.

²⁴ Press Release, Office of Supervisor Mark Farrell, Supervisor Farrell to Introduce First-Ever Law Guaranteeing Internet Access in Multi-Unit Buildings (Oct. 19, 2016), available at http://www.markfarrell.com/supervisor_farrell_to_introduce_first_ever_law_guaranteeing_internet_access_in_multi_unit_buildings.

were to grant the instant Petition, not only would it risk the competitive builds that are happening in San Francisco, it would be sending a competition killing message to all cities that are considering actions they can take to lower the barriers to entry. Such action would be inconsistent with the Commission's current agenda to encourage more facilities-based competition and contrary to the interests of consumers.

III. CONCLUSION

Because Article 52 increases MDU tenants' access to competitive communications services, lawfully eliminates a major barrier to entry for competitive providers, and furthers the Commission's goals of accelerating deployment of high-speed Internet access, INCOMPAS urges the Commission to deny the Multifamily Broadband Council's Petition for Preemption.

Respectfully submitted,

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